

REMARKS/ARGUMENTS

Applicants request that the examiner consider the following remarks upon further review of the instant application.

Claim Rejections for Anticipation or Obviousness – 35 U.S.C. §§ 102(e) & 103(a)

Claims 1, 2, 5, 6, 9, 10, 13, 14, 16-18, and 20-25 are rejected as either anticipated by, or in the alternative, obvious in view of U.S. patent application publication no 2003/0107927 A1 of Yerushalmi et al. (the '927 publication). By rejecting the claims under § 102(e), the examiner acknowledges that the '927 publication was published after the filing date of Applicants' application, but the reference ostensibly may have an earlier priority date than Applicants' priority date due to either its earlier filing date or priority claim, or both. The instant application has a filing date of 26 September 2001 and a priority date of 13 August 2001 based upon U.S. provisional application 60/312,264 (the '264 application).

The filing date of the '927 application is 31 July 2002. The alleged effective date of the '927 publication is based upon the earlier filing of a U.S. provisional patent application no. 60/274,635 (the '635 application) on 12 March 2001, which is earlier than Applicants' priority date of 14 August 2001, and thus may, at least facially, be considered prior art to this application. However, a 35 U.S.C. § 102(e) reference is only effective as anticipatory to the extent that any priority applications upon which the effective date is based also disclose the subject matter upon which the rejections in the Office action are founded. M.P.E.P. § 2136.03(II) & (III). "The subject matter used in the rejection must be disclosed in the earlier-filed application in compliance with 35 U.S.C. § 112, first paragraph in order for that subject matter to be entitled to the earlier filing date under 35 U.S.C. § 102(e)." M.P.E.P. § 706.02(f)(1)(I)(C)(1).

In this case, the '927 publication is not an effective § 102(e) reference because the '625 application, i.e., the priority document upon which the effective date of the '927 publication is based, does not disclose the subject matter forming the basis for the rejection. Applicants can find no comparable disclosure meeting the requirements of § 112 in the '625 application that forms the basis of the rejections founded on the '927 publication.

Thus the rejections and objections to the claims are unfounded because the disclosure of the '927 publication is not entitled to an earlier effective date. The subject matter added to the '927 publication upon which the rejections are based may only be accorded only an effective date of 31 July 2002, the filing date of its corresponding application. Thus, both Applicants'

14 August 2001 priority date and 26 September 2001 nonprovisional filing date are entitled to priority over the '927 publication.

Applicants further note that the '927 publication also makes a priority claim to intervening Patent Cooperation Treaty (PCT) application no. PCT/US2002/07178 (the '178 application). However, the filing date of the '178 application is 12 March 2002, which is after both Applicants' priority date and Applicants' nonprovisional filing date and thus fails to operate as a valid prior art reference. Further, the '179 application also fails to disclose the subject matter forming the basis of the rejections in the present Office action.

Because the reference forming the basis for all rejections is cannot be considered an effective prior art reference, Applicants request that the rejections of claims 1, 2, 5, 6, 9, 10, 13, 14, 16-18, and 20-25 and the objections to claims 3, 4, 11, 12, 15, and 19 be withdrawn.

Conclusion

For the reasons set forth above, Applicants respectfully request that a new Notice of Allowance be swiftly issued in this case and that the issue fee previously paid by Applicants be applied to any new request for payment of an issue fee. Applicants further request that the issuance of a patent on these claims be expedited due to the improper withdrawal of the application from issue by the Office and the delay in issuance caused thereby.

Respectfully submitted this 12th day of May 2005.



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